



New England Fishery Management Council

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David V.D. Borden, *Chairman* | Paul J. Howard, *Executive Director*

TO: Tom B. ✓
KAPW

April 1, 2004

Rolland A. Schmitten, Director
Office of Habitat Conservation
NOAA National Marine Fisheries Service
F/HC, 1315 East-West Highway
Silver Spring, MD 20910

RE: Comments on the Advance Notice of Proposed Rulemaking (ANPR) addressing potential revisions to the essential fish habitat (EFH) guidelines

Dear Rollie:

The New England Fishery Management Council submits the following comments in response to the above noted ANPR. Thank you for providing us the opportunity to address this important topic.

To the question of whether or not the guidelines should be revised, our initial response is "yes". The Council is taking a proactive course to update the EFH components of our FMPs to meet the five-year review requirement via an Omnibus Habitat Amendment. We hope to work collaboratively with NOAA Fisheries on all aspects of this amendment. More importantly, we are reviewing our components based on the requirements of the current EFH Final Rule and we are concerned that new guidelines, resulting from this review, may substantially change the mandatory EFH components of FMPs (e.g., review of EFH designations, gear effects evaluation, adverse impacts determination, and measures to minimize adverse effects).

With that said, there are parts of the EFH Final Rule that the Council would like to see addressed by NMFS and modified to include the following points:

EFH Designations

- Recently, the Council initiated a mandatory five-year review of the EFH components of our fishery management plans. We plan on reviewing and revising our EFH designations with the hope that the designations can be more refined and, therefore, more meaningful. However, designating EFH for each species and life stage will likely result in a similar, though less concentrated, range of EFH. The SFA states (600.815(a)) that "EFH must be

designated for each managed species, but, where appropriate, may be designated for assemblages of species or life stages that have similar habitat needs and requirements.” It is possible that by using species assemblages to designate EFH, the range and locations of EFH may be more appropriate. Therefore, the requirement to designate EFH on a species-by-species basis should be revised to allow the use of assemblage-based or community-based designations. Further, it is imperative that the Councils receive guidance on how to implement the section of the EFH final rule quoted above regardless of revision.

Fishing Gear Effects Evaluations

- The NMFS guidelines on gear effects evaluations state, “Councils should use the best scientific information available, as well as other appropriate information sources.” In our efforts to document and describe the effects of fishing gears used in the northeast U.S., we have employed a variety of literature sources (white and grey) with different levels of success. For instance, the literature and experiments on the effects of otter trawls are well documented, whereas the literature on the effects of scallop dredges is limited. Studies done to document the effects of scallop dredges number six (6), none of which were conducted on offshore scallop grounds using dredges towed at speeds used by commercial scallop vessels. No studies have been conducted to document the short-term post dredging impacts from one or more passes of the New Bedford style dredges. Additionally, resources are needed to determine applicability of other studies to this gear type. The NMFS guidelines should be modified to include more detail on the level of information needed to determine that a gear is adversely impacting EFH.
- The current gear effects evaluations are, in some cases, unable to determine whether the threshold of “more than minimal and less than temporary in nature” is met. Further, detail on “other appropriate information sources” needs to be provided or removed from the guidelines.

Minimizing Adverse Effects

- The NMFS guidelines on EFH should include specific guidance to enable the Councils to ascertain if they are meeting the requirements to minimize adverse effects on EFH.
- When Councils address mitigation of fishing effects on EFH through the tools available to them, the guidelines should include incentives for Councils to develop or use alternative gears in each fishery, shift gears to areas with lower habitat impacts, or direct effort reductions in particular habitats or areas. Additionally, the guidelines must allow for utilization of the fishery resources while encouraging the fishing effort in the smallest ecological footprint.
- The NMFS EFH guidelines on the term “to the extent practicable” and the description of a practicability analysis are very weak. Improved specifications to functionalize the term

through a more thoroughly described practicability analysis are necessary. On many occasions, our Council staff has requested guidelines on practicability analyses without success. As such, these analyses were developed with little direction and fall short in many areas.

Non-fishing effects

- NMFS should place more emphasis on minimizing the adverse effects of non-fishing impacts on EFH. In the Council's 1998 Omnibus Habitat Amendment, the Council identified a vast array of threats to EFH from non-fishing impacts (Table 1). The EFH guidelines state that NMFS may "coordinate with and provide information to, other Federal agencies regarding the conservation and enhancement of EFH." Further, the NMFS is directed "to provide EFH Conservation Recommendations to Federal or state agencies on actions that may affect EFH." The Council believes that these conservation and enhancement recommendations should become permit or project requirements to the extent practicable. Much emphasis is placed on the mandatory requirement to minimize fishing impacts while non-fishing projects that may adversely affect EFH are not subject to the same constraints. Marine and aquatic habitats are threatened by human population growth and increased coastal development, which is contributing to an increase of human generated pollutants. These pollutants are being discharged directly into riverine and inshore habitats by way of both *point* and *non-point* sources of pollution. Point sources of pollution include industrial discharge, power plants, sewage treatment plants, disposal of dredged materials, energy and mineral exploration, marine transportation, coastal and port development, and erosion. Non-point sources include run-off, wildlife feces, industrial shipping, recreational boating, septic systems, and contaminated groundwater and sediments.

THREATS

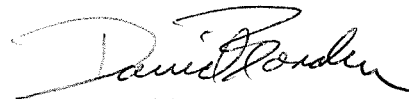
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Other Required Provisions

- The NMFS guidelines should be modified to include more detail on the use of the precautionary approach in managing EFH.
- The requirement of the EFH guidelines to conduct a cumulative effects analysis is redundant with the NEPA requirement and should be removed from the guidelines. Further, more detailed guidelines on how to meet the NEPA requirements for cumulative effects analyses as they pertain to EFH should be provided to the Councils.
- The guidelines should include formal language to describe the Councils' responsibilities versus the NMFS's responsibilities (e.g., data collection, map preparation, habitat science responsibilities, etc.) for EFH. As EFH is an unfunded mandate, a requirement to establish interagency work teams should be considered. Further, NMFS should consider directing EFH monies to the Councils to meet EFH requirements and encourage the Fishery Science Centers to organize to meet the science and analytical needs of the EFH mandates.
- Guidance should be developed that clearly describes the EFH requirements of the various fishery management plan actions (e.g. annual specifications vs. framework measures vs. FMP amendments). This guidance should include any requirements that result from past and recent litigation.
- The NMFS guidelines should establish a peer review process specifically for SFA EFH scientific exercises and analyses, supported by NMFS staff and budget resources.

We look forward to working with you and your staff closely on any potential new guidelines and are available to discuss our comments. Please contact Paul Howard at (978) 465-0492 with any questions you may have.

Sincerely,



David V.D. Borden
Chairman

cc: Ms. Patricia Kurkul
Council's Executive Directors



**Western
Pacific
Regional
Fishery
Management
Council**

April 24, 2004

Rolland A. Schmitten
Director, Office of Habitat Conservation
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr Schmitten:

This letter contains a synthesis of public comments on NMFS' intent to revise the guidelines for Essential Fish Habitat (EFH), as indicated in the February 25, 2004 Federal Register Notice.

The Western Pacific Council fully supports the need to identify and protect EFH for target and non-target fishes. However, the Council believes that the current guidelines go far beyond the EFH provisions in the 1996 Magnuson-Stevens Act (MSA) and do not reflect the original intent of Congress. In the MSA, Congress made a single EFH finding and purpose, and added one non-discretionary item to the contents of Fishery Management Plans. In summary Congress gave the Councils the opportunity to comment on EFH, and so directed the Secretary of Commerce. Unfortunately, NMFS over-zealously interpreted the Act's EFH language and implemented guidelines that address among others activities; non-MSA fishing activities that may adversely affect EFH, non-fishing related activities that may adversely affect EFH, cumulative impacts, impacts on prey species, and identification of Habitat Areas of Particular Concern. The breadth of topics to be included in any EFH analysis is so diverse and open-ended, that it is in all likelihood inconsistent with National Standard 7. This Standard requires that 'conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication'.

Our other concerns include the following. More guidance is needed on what is meant by 'essential'. At present, it seems that anywhere a species of fish is found is regarded as 'essential'. This leads to broad designations. Clearly, some species of fish have extreme site fidelity, such as some coral reef fish which are obligate commensal with corals or other coral reef biota. By contrast, others such as highly migratory tunas are so widely distributed in the tropical and sub-tropical pelagic ecosystems that one is reduced to making meaningless definitions (such as isobath ranges), which may encompass both a range of demersal habitats, and oceanographic structures and conditions. The Councils clearly need more objective guidance on what essential means in this context.

The Council questions the need for five year EFH reviews as advanced by NMFS. This is a costly and time-consuming exercise, and may and not needed in every case. Fishing has already been

shown to have very little impact to habitat in some locations, while in areas where fishing does have potential habitat impacts, Councils are continually reviewing these. In summary, the EFH consultation process already in place for FMPs is sufficient and the effort and additional burden to Councils being contemplated by NMFS is not justified.

The revised guidelines should allow increased flexibility in EFH designations and consultation as each region has its own issues and should address them in an appropriate manner. The Western Pacific Council's jurisdiction includes virtually no areas of continental shelf or shallow water habitats. The Council's list of allowable gear types does not include those such as demersal trawls known to have major impacts to substrates and habitats. Similarly, research has also shown that in other areas of the US, such as the Mid-Atlantic region, fishing gear has no major impacts on the vast majority of ocean bottom. In short, why do we need another major initiative to confirm what we already know not to be a problem?

NMFS should utilize the Habitat Areas of Particular Concern (HAPC) process already in place, rather than trying to refine EFH designation. This monolithic one-size-fits-all approach ensures that the process lacks the flexibility required to deal with regional differences, whereas, the use of HAPC means that definitions can be tailored to local circumstances.

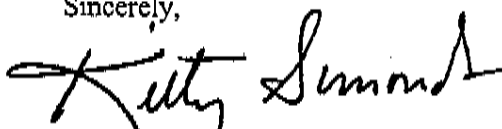
The open-ended nature of the requirements laid out in NMFS' guidelines imposes a considerable research burden on NMFS and the Councils. However, these research requirements need to be funded adequately. To make requirements without supplementing funding simply creates additional problems.

In addition, more guidance is needed on how to realistically evaluate/address impacts on prey species. We do not have any real understanding of the populations dynamics of many of the target species of fishing, let alone the dynamics of their prey. Detecting population abundance change from fishing effects versus natural fluctuations is highly unlikely for most species and the guidance should acknowledge this and provide advice accordingly.

NMFS (and the regulations if possible) should focus on the ocean environment impacts to EFH, as it is well known that in many areas these are much greater than fishing impacts. Physical processes in the ocean by and large have a much stronger influence on population abundance, particularly in species with high turn-over rates. Demersal substrates can and are subject to profound changes from ocean storms and cyclones, resulting in huge shifts in fish biomass and abundance. Major oceanic processes such as the El Niño-Southern Oscillation in the Pacific profoundly changes the pelagic environment, with immediate and long term effects on fish distribution and abundance.

Thank you for this opportunity to comment on the revision to the EFH guidelines.

Sincerely,



Kitty M. Simonds
Executive Director

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April 21, 2004

Rolland A. Schmitten, Director
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NOAA National Marine Fisheries Service
F/HC-EFR ANPR
1315 East-West Highway
Silver Spring, MD 20910

RE: EFH ANPR - Comments due by 4/26/04

Dear Mr. Schmitten:

The South Atlantic Council began addressing habitat considerations well before the interim and final habitat rules and associated guidance were finalized. The Council intends to continue leading in this area by updating and expanding the existing Habitat Plan (October 1998). With the existing Habitat Plan as a cornerstone, the Council is moving forward to develop an ecosystem-based approach to resource management. Evolution of the Habitat Plan into a Fishery Ecosystem Plan, and transition from single species management to ecosystem-based management, will require a greater understanding of the South Atlantic Bight ecosystem and the complex relationships among humans, marine life, and essential fish habitat.

Based on the Council's habitat work, we do not see a need to revise the current EFH guidelines. However, if the guidelines are revised we have one item we would like to see addressed;

§600.920 (e) (3) - Mandatory Contents of EFH Assessments: 1) A review of literature should be a mandatory, not additional component. 2) Mitigation proposals are included as a mandatory component. This frontloads mitigation into the assessment process, potentially at the expense of full natural habitat protection. Mitigation rarely involves kind for kind, on-site, 1-to-1 replacement of prior habitat values. Mitigation should be an additional, not mandatory component of EFH assessments.

In conclusion, let me say that the South Atlantic Council will continue to work within the existing M-SFMCA wording and guidelines to protect habitat.

Best Regards,

A handwritten signature in black ink that reads "David" followed by a stylized monogram or initials.

David Cupka
Chairman

cc: Council members & staff
Habitat and Coral Advisory Panels
Council Executive Directors
Monica Smit-Brunello
Ginny Fay, Joe Kimmel, Miles Croom and David Dale
Nancy Thompson and John Merriner

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April 26, 2004

Mr. Rolland A. Schmitten, Director
National Marine Fisheries Service, Office of Habitat Conservation
F/HC - EFH ANPR
1315 East-West Highway
Silver Spring, MD 20910

Re: Proposed Rulemaking Regarding Essential Fish Habitat Guidelines

Dear Mr. Schmitten:

The Pacific Fishery Management Council (Council) takes this opportunity to comment on the Advance Notice of Proposed Rulemaking addressing potential revisions to the essential fish habitat (EFH) guidelines. Our comments support a continuation of a strong EFH policy to protect our fishery resources.

The existing EFH guidelines provide NMFS and the Council the only means to act proactively through consultation with other agencies to protect the habitat needed by their managed resources. The Council believes that collaborative and proactive efforts to conserve habitat will help avoid future species listings and overfishing designations.

The Council does not advocate any major revisions to the EFH guidelines. We suggest the following changes to make the guidelines more effective in protecting and improving productivity of fish habitat.

1. The action agencies now determine when they may have adverse impacts and need to consult. The rule should better define "adverse effects" to clarify and strengthen the triggering mechanism and requirements for consultation.
2. Federal agencies are supposed to respond in writing within 30 days as to their proposed actions to address recommendations provided by NMFS or the Council. This statutory requirement is not consistently or frequently adhered to. Please consider strengthening the guidelines by adding non-compliance penalties.

3. The Council urges you to maintain current guidance for habitat protection to assure priority is always given to avoidance of impacts rather than minimization or mitigation of impacts. This concern is especially important in areas designated as habitat areas of particular concern and in areas of EFH that provide habitat important to stocks that are listed under the Endangered Species Act or that are rebuilding, have low fecundity, sporadic recruitment, or are long-lived. Mitigation for unavoidable impacts should be located in the vicinity of the impact, if possible, and should focus on restoring ecosystem functions that have been adversely impacted.
4. The Council supports and emphasizes the need to maintain and strengthen the section regarding degraded or inaccessible aquatic habitats (600.815 (a) (F)). We recommend the rules allow designation of EFH (or potential EFH) in historic habitat areas where there is reasonable potential for restoration of important ecosystem functions. There are proposals in both estuarine and riverine environments (such as the Cargill salt ponds in San Francisco Bay, or above dams such as Iron Gate on the Klamath, Round Butte on the Deschutes, Hells Canyon on the Snake River, and Chief Joseph on the Columbia), where restoration is planned or where passage could be a requirement of Federal Energy Regulatory Commission relicensing. Without such consideration, important options for restoring habitat could be lost. For example, failure to designate EFH above currently impassable dams could be used as an argument not to provide restoration above those dams.

Thank you for the opportunity to comment. We strongly support the existing EFH rules and requirements for consultation. The rule takes a proactive approach to protecting, enhancing, and conserving EFH to avoid species declines and listings. We look forward to working with you and your staff on any potential guideline revisions. Please feel free to contact us if you have any questions.

Sincerely,



Donald K. Hansen
Chairman

JDG:rdd

c: Pacific Fishery Management Council members
Dr. Donald McIsaac
Ms. Jennifer Gilden